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Scruggs, John

From: Galletta, John
Sent: Wednesday, June 23, 1999 12:19 PM
To: McKittrick, Beverly; Cooper, David; Colby, Dolly; Han, Vic; Hoel, John; Liebengood, Howard; Maheras, John; Nicoli, David; Parrish, Steve; Reese, Robert; Scott, Gregory; Scruggs, John; Scully, Timothy
Subject: McConnell press conference

**Press conference to introduce the Litigation Fairness Act
Mansfield Room, S-207 Capitol, Washington DC.
9:30 a.m., Wednesday, June 23, 1999**

Speakers

- Sen. Mitch McConnell (R-KY)
- Alabama Attorney General Bill Pryor
- Bruce Johnston, Exec. VP of Government Affairs, U.S. Chamber of Commerce, and the Coalition for Legal Reform
- Victor Schwartz, Council to the American Tort Reform Association, senior partner at Crowell & Moring

Media: Cameras: ABC, CBS, NBC, CNN, C-SPAN. Print: AP, State News Service, Business Insurance News, Birmingham News, Bloomberg, Congress Daily, BNA. (None of the major papers.)

Visual: Poster board with quote: "There's no difference between Ronald McDonald and Joe Camel." -- Yale professor (unnamed) (During his remarks, McConnell referenced this and said the professor also said "Both market products that are luring our children into killer habits."

Summary: The bill would specify that industries sued by governments have the same rights and defense as if they were sued by individuals, and provides that if an injured party would not normally be able to sue a company for a particular grievance, then the government is also forbidden from suing on their behalf. The speakers stressed that:

- the bill is about tobacco.
- it did not prohibit government lawsuits, place caps on recoveries, or limit attorneys fees.
- the precedents established in the tobacco suits are now being used in gun and lead paint suits, and could be used next against fast food, automobiles or other industries.

Details

McConnell

This "common-sense legislation" says that whenever government sues private sector companies, the government plaintiff gets no more rights than average citizens. Government should not have rights superior to those of private plaintiffs. If the law is good enough for plaintiffs, it's good enough for government. This bill is necessary to prevent taxation through litigation by "money-hungry trial lawyers and big government public officials" who are "bypassing legislatures."

This legislation is not about tobacco. Tobacco was just the beginning. After tobacco we had guns, and now the plaintiffs' bar is turning to auto manufacturers, paint manufacturers, and even the fast food industry.

This does not prohibit government lawsuits. It does not close the courthouse door to injured parties. It does not place caps on recoveries or limits on lawyers fees. It doesn't prohibit "the unholy marriage between plaintiffs lawyers and government officials," although it does make it a little less desirable.

Pryor

The government lawsuits are "a new and dangerous form of lawsuit abuse" that "pits the awesome power of government against ordinary citizens."

Two years ago I warned in editorials in the WSJ and NYT that the tobacco suits would be setting a precedent that could endanger "the entire business community." Since then things have deteriorated and this model is being used by various levels of government against new industries.

This type of suit shifts the powers of the legislative branch - commercial regulation, taxation, the power to change laws - to the judiciary. This will result in "assaults on civil rights, democratic representation and free enterprise."

These lawsuits "represent the antithesis of the rule of law - namely, the end justifies the means."

Johnston

My two groups endorse this legislation. This does not bar suits by government agencies against private defendants. It does not place caps on recovery. It does not limit attorneys fees.

Government should not be a "super-plaintiff." The trial bar should not become the new third branch of government. The courts and contingency fee attorneys are not accountable to the people.

Regulation and taxation without litigation usurps the power of Congress. Also, if governments can retroactively change the rule of law and then stack the deck in their favor, no industry is safe. The Litigation Fairness Act "amendment" will preserve the authority of Congress to set national policy.

Schwartz

This isn't meant to help unpopular defendants. It's meant to ensure that an individuals' rights are primary and the government's are secondary. This has been a standard of American law for 240 years. But in the tobacco cases, "a few lower courts" set forth a principle that would change this standard - they said government had "quasi-sovereign power."

A colleague of mine suggested that automobiles could be next - (1) Most of them will go over 100 mph, though there is "no legitimate purpose" for that speed. (2) They bring about costs to the government through Medicaid and Medicare in the billions of dollars annually. Thus, if government can get rights that are superior to individuals, "we can have income from lawsuits that would even dwarf the tobacco settlements. But we're going to wait until the time is right."

Some high-level government officials have suggested that this principle would only be applied to "one or two unpopular industries." If that's true, then ATRA would hold that it's a denial of equal protection under the law. If it's not true, then fast food cases, alcohol cases, even automobile cases are very feasible. (He also noted that a "very prominent attorney" had written a law review article recently suggesting that alcohol companies could be sued on behalf of people injured in drunk driving accidents.)

Q&A

Q: Can you elaborate on your claim that the government has super-rights?

McConnell: We're seeking to prevent the government from having rights as a plaintiff superior to those as individuals.

Follow-up: But can you be more specific as to what those rights are?

Schwartz: Normally the plaintiffs' fault is considered to one extent or another. In the precedents that were established in the tobacco cases, the government would enter as a plaintiff with no fault at all. That theory probably will also be used in the gun cases. Second, plaintiffs have to show that the defendant's conduct caused that injury. Those principles of causation were ignored in the tobacco cases and the governments were allowed simply to use statistical evidence. Third, the cases ignored the statute of limitations.

So, by way of example, a state could sue the automobile industry (or the alcohol industry) for the entire cost of treating a Medicaid recipient hurt in a driving accident, while completely ignoring the fact that the driver who hit him was drunk and going 140 mph.

Pryor: Let me give you a concrete example. When I was Deputy AG, I attended a briefing in Chicago by the Mississippi tobacco lawyers. The traditional principle under which third-party Medicaid suits would be filed -

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subrogation - was purposefully ignored in their suit. Instead, they sued under new theories of unjust enrichment and indemnity which they applied in new ways. So this is not theoretical. It's really happening.

Q: Some would say this legislation would serve as a shield for bad corporate behavior by providing protection against lawsuits. They argue that only the government has the resources to take these corporations on. How would you respond?

McConnell: This legislation doesn't prohibit lawsuits. It simply says the government doesn't have any more rights than regular citizens.

Q: Do you believe the current Administration has more leverage and is (assaulting corporations?) based on these lawsuits?

McConnell: The President announced in his State of the Union that he wants to bring a federal lawsuit against tobacco. I know for a fact that the "real lawyers" in the Justice Department see no basis for such a suit. Nevertheless, Reno appears to be going ahead with it.

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